

DOCUMENT RESUME

03598 - [A2513629]

[Protest to Sole Source Procurement]. B-188729. September 6, 1977. 6 pp.

Decision re: Aydin Corp.: Vector Div.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).
Organization Concerned: Department of the Navy: Naval Air
Systems Command; Microcom Corp.
Authority: 10 U.S.C. 2324(a) (?). A.S.P.R. 3-202.2(vi). B-185399
(1976). B-181064 (1974). B-182340 (1975). B-187902 (1977).
B-182536 (1975). B-187779 (1977).

Protester to a contract award claimed that sole-source procurement was not justified and objected to proposed two-step formal advertising in future competitive procurement. Authorization for sole-source procurement was not found to be unreasonable or prejudicial. The protest to future procurement was premature and not for consideration. (HTW)

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DECISION



*W.A. W. [unclear]
Proc. 76*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-188729

DATE: September 6, 1977

MATTER OF: Aydin Corporation, Vector Division

DIGEST:

1. Sole-source award under "public exigency" justification of 10 U.S.C. § 2304(a)(2) (1970) is proper, as record does not show that contracting officer acted without reasonable basis in authorizing sole-source procurement.
2. Use of sole-source procurement for entire inventory shortage is reasonable where entire quantity is urgently needed and only one source is certain to meet required delivery schedule.
3. Failure to timely publish notice of procurement in Commerce Business Daily was not prejudicial to protester where agency properly determined to make sole-source award due to tight delivery schedule.
4. Protest of proposed use of two-step formal advertising in future procurement is premature and not for consideration.

The Naval Air Systems Command (NAVAIR) awarded contract N00019-77-C-0087 to the Microcom Corporation (Microcom) on a negotiated sole-source basis on March 22, 1977. The contract was for 600 telemetry data transmitting sets (AN/DKT-38) to be used in the Sparrow III missile.

By letter filed in our Office on March 31, 1977, the Aydin Corporation, Vector Division (Aydin-Vector), protests the award on the basis that certain facts leading up to and surrounding the procurement do not support NAVAIR's justification for using a sole-source procurement--that the urgent need for the items precluded any type of competitive procurement. Aydin-Vector also argues that, even if there was an urgent need sufficient to justify negotiation rather than formal advertising, there was no justification for using sole-source negotiation for the entire shortage. This argument is based on Aydin-Vector's contention that NAVAIR's estimate of the time required for delivery of the items under a competitive procurement if a nonproducer is the awardee is unreasonable.

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Aydin-Vector also protests NAVAIR's proposed use of two-step formal advertising in a future competitive procurement, and the short period of time between NAVAIR's notice of the proposed March procurement in the Commerce Business Daily (CBD) and the sole-source award to Microcom.

Chronology of NAVAIR AN/DKT-38 Procurements

The chronology of NAVAIR's AN/DKT-38 procurements is important to both Aydin-Vector's arguments and NAVAIR's rebuttal. The AN/DKT-38 was first developed and produced by Microcom under NAVAIR contract N00019-72-C-0631 dated June 29, 1972. That contract was for development of 5 prototypes and 195 production units, with an option for 305 additional units which was exercised on June 29, 1973. NAVAIR, in its report of May 2, 1977, stated that these 1,000 units were estimated as sufficient to satisfy needs for a 3-year period beginning July 1973, based on usage rates of 300 units per year. These units were not, however, issued for use until July 1975, and in the intervening period actual usage rates had increased to 450 units per year.

In September 1976, NAVAIR proposed a sole-source award to Microcom to be made in December 1976 for 120 units with an option for 60 additional units. Upon learning of this proposed procurement Aydin-Vector protested orally to NAVAIR. NAVAIR met with Aydin-Vector and explained that the procurement was to be sole-source because the data package was deficient and the items were urgently needed to meet a temporary inventory shortage caused by unanticipated foreign military sales and repayment to the Air Force for borrowed units. NAVAIR informed Aydin-Vector that this procurement would clear up the inventory shortage and that the next procurement would be competitive. NAVAIR decided not to include the proposed option in the December procurement because it was not thought to be necessary to alleviate the inventory shortage then in evidence, and in order to increase the quantity for the proposed competitive procurement. Aydin-Vector did not file a formal protest of the December 1976 procurement.

NAVAIR has stated that its procuring officials were unaware of the large inventory shortage that was developing until after the December 1976 procurement. When NAVAIR became aware of the shortage it requested the Pacific Missile Test center (PMTTC) to estimate the delivery time under the proposed competitive procurement. PMTTC determined that it would take 18 months until first delivery of

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production units if a nonproducer (anyone other than Microcom) were to be awarded the contract. NAVAIR then determined that 600 units would be required to meet fleet needs.

On March 18, 1977, NAVAIR placed a notice in the CBD to the effect that it intended to negotiate a sole-source contract for 600 units with Microcom. On March 22, 1977, the contract was awarded to Microcom. The justification given for the sole-source procurement was the urgent need for the units to alleviate the unanticipated shortage that had developed and the long lead time that would be required before delivery under a competitive procurement.

Propriety of Using Sole-Source
Negotiated Procurement

Section 2304(a)(2), title 40, United States Code (1970), provides for the negotiation of a contract if "the public exigency will not permit the delay incident to advertising." The Determination and Findings issued by the contracting officer on March 1, 1977, states that the proposed contract may be negotiated without formal advertising under the "public exigency" exception of 10 U.S.C. § 2304(a)(2) because it has been assigned Uniform Material Movement and Issue Priority System (UMMIS) Priority Designator 3. This is consistent with ASPR § 3-202.2(vi) (1976 ed.).

While the "public exigency" exception does not per se authorize a sole-source procurement, it gives the contracting officer considerable discretion to determine the extent of competition consistent with the urgent needs of the Government. Emerson Electric Company, Rantec Division, B-185359, August 10, 1976, 76-2 CPD 143; Janke and Company, Incorporated, B-181064, August 29, 1974, 74-2 CPD 126. Unless it is shown that the contracting officer, in authorizing a sole-source procurement, acted without a reasonable basis, our Office will not question the award. Leo Kanner Associates, B-182340, April 4, 1975, 75-1 CPD 205.

Aydin-Vector advances a number of arguments in attempting to show that the "public exigency" justification was not reasonable in light of the factual circumstances. First, Aydin-Vector contends

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that the alleged 600 unit shortage is not credible without independent verification as it represents a 30 to 50 percent increase in usage rates. Additionally, Aydin-Vector argues that a December 14, 1976, telex from NAVAIR to PMTC shows that NAVAIR was aware of the "shortage" and was planning another sole-source award to Microcom before the December 1976 award was complete. Also, it contends that the cancellation of the option in the December award was inconsistent with claims of a shortage.

Aydin-Vector supports its assertion that the 600 unit shortage is not credible merely by pointing out the large increase it represents in usage rates, and noting that usage rates are predictable. NAVAIR stated that the shortage was caused by underestimating usage rates, by a large unanticipated foreign military sales requirement in fiscal year 1976, and by the introduction of the transition quarter. These reasons appear credible in the absence of evidence to the contrary.

NAVAIR responded to Aydin-Vector's allegation that a December 14, 1976, telex from NAVAIR to PMTC showed NAVAIR's awareness of the alleged shortage, by pointing out that the telex was from program officials at NAVAIR rather than procuring officials and that even the program officials had no knowledge of the exact quantity of the emerging shortage. Additionally, NAVAIR states that it canceled the option before it knew of the size of the shortage as a good faith gesture to increase the size of the proposed competitive procurement.

While the interpretation of these facts may be subject to some dispute, Aydin-Vector has not shown that the contracting officer acted without a reasonable basis in authorizing a sole-source procurement for at least a portion of the shortage.

Reasonableness of NAVAIR's Competitive Procurement Lead-Time Estimate

Aydin-Vector has also disputed NAVAIR's estimate that a competitive procurement would require 18 months from the initiation of the solicitation to the date deliveries would begin, if a non-producer were the awardee. Aydin-Vector has submitted its own estimate of 9 months, which it considers reasonable. Aydin-Vector

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challenges the reasonableness of NAVAIR's estimate on the ground that it is based on the time that would be required using two-step formal advertising. Aydin-Vector argues that two-step formal advertising is not permitted where the data package is adequate and complete, as it alleges is the case here.

In deciding whether it was proper for NAVAIR to use a sole-source procurement for the entire shortage it is not necessary for us to reach the issue of whether it was reasonable for NAVAIR to base its estimate on two-step formal advertising, as NAVAIR's decision appears reasonable, as discussed below, notwithstanding Aydin-Vector's estimate that it could begin deliveries in 9 months.

Under the March contract with Microcom deliveries were to begin in June 1977 and are to end in February 1978. In other words, NAVAIR needs the full 600 unit shortage to be alleviated by February 1978. According to Aydin-Vector, if NAVAIR had expedited completion of the data package, a competitive negotiation could have been begun at the end of January 1977. Using its 9-month first delivery estimate Aydin-Vector maintains that it could have begun delivery in November 1977. Therefore, Aydin-Vector contends that, even if there was sufficient urgency to justify use of the "public exigency" authorization for negotiation, NAVAIR should have used a competitive procurement for the number of units that would not be needed until the period from November 1977 to February 1978.

This argument, of course, assumes that a competitive procurement package could have been ready in January 1977, which in fact did not occur, and that Aydin-Vector's 9-month estimate was realistic, which NAVAIR disputes.

In Applied Devices Corporation, B-187902, May 24, 1977, 77-1 CPD 362, we stated:

"* * * [O]ur Office has accorded considerable weight to estimates by contracting agencies of technical risks and the potential for resulting delivery delays inherent in introducing competition into sole-source situations. * * *

"Technical and delivery risks become particularly compelling where the sole-source procurement is being conducted to satisfy urgent needs. * * *"

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In Applied Devices we found that a portion of the required quantity should not have been procured on a sole-source basis. This was, however, based on a determination that there was no bona fide urgency for that portion. Additionally, the contract covered the agency's entire foreseeable requirements with delivery to extend over a 4-year period.

Here the contract covers only NAVAIR's current and urgent requirements for approximately a 1-year period. Additionally, there are future requirements for which competition is now being introduced. Therefore, while NAVAIR's 18-month estimate may or may not have been reasonable, Aydin-Vector has not shown, by a basically unsupported assertion that under apparently optimum conditions it could have met NAVAIR's needs for the final 3-4 months of the shortage, that NAVAIR's decision to use sole-source negotiation for the entire shortage was unreasonable.

Regarding Aydin-Vector's complaint of untimely notice of the March 1977 procurement in the CBD, since we have determined that it was not unreasonable for NAVAIR to assume that only Microcom could meet the required delivery schedule, we are unable to conclude that Aydin-Vector was prejudiced by the lack of timely publication. See Stewart-Warner Corporation, B-182536, February 26, 1975, 75-1 CPD 115.

Aydin-Vector's protest of NAVAIR's proposed use of two-step formal advertising in the future competitive procurement is premature and will not be considered. See Loral Electronic Systems Division, Loral Corporation, B-187779, February 22, 1977, 77-1 CPD 125.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States